

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 337 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and  
MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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NICHHUBHAI D DESAI

Versus

COMMISSIONER OF INCOME-TAX

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Appearance:

MR JP SHAH for Petitioner

MR MANISH R BHATT for Respondent No. 1

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CORAM : MR.JUSTICE R.K.ABICHANDANI and  
MR.JUSTICE KUNDAN SINGH

Date of decision: 01/05/98

ORAL JUDGEMENT

Per R.K.Abichandani, J :

The Income Tax Appellate Tribunal has referred the following question for the opinion of this High Court under the provisions of Section 256(1) of the Income Tax Act, 1961.

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the transaction of sale of land by the assessee was an adventure in the nature of trade?"

2. The reference relates to assessment years 1970-71 and 1971-72. Earlier the matter had reached the High Court and by order dated 17.4.1981 passed in ITR 96 of 1977, the question was left unanswered remitting the matter to the Tribunal for a fresh decision in accordance with law with liberty to the parties to adduce additional evidence. Thereafter, the appeal was disposed of afresh by the Tribunal by its decision dated 21.12.82 from which the aforesaid question of law is referred for the opinion of this court.

3. Before the ITO in respect of the two previous years relevant to the assessment years under consideration, the assessee had claimed that the land in question was purchased by him for the purpose of starting an industry, but, due to adverse family circumstances the business could not be started, and, since the land was not yielding any income, it was sold off to recover the capital investment, and long term gains arisen therefrom were shown as capital gains in the returns. The ITO accepted this claim in respect of both the years. The Commissioner of Income Tax in exercise of his powers under Section 263 of the Act after hearing the assessee came to a finding that the subsequent course of events did not support the assessee's claim and even though the assessee might have had an intention to start some industry in India in the beginning of 1965 that by itself did not show that the land was purchased by him in 1967 only with the intention of establishing an industry. It was found that the land which was purchased by the assessee on 20.4.67 was sold away between 1.4.68 to 31.3.70 and he had also purchased other lands during the relevant previous years which were also sold by him. It was found that if the assessee's claim that the purchase of land in question was only with an intention of establishing an industry was correct, then he would not have entered into further transactions of purchase and sale of other lands, after he had decided to dispose of the land first purchased on 20.4.67. It was therefore held that the ITO had erred in treating the profit as capital gains. The appeals which were preferred by the assessee against the order made under section 263 by the Commissioner came to be allowed by the Tribunal on 23.7.75 and the orders of the Income Tax Officer for both

the years under appeal were restored. From that order of the appellate Tribunal ITR No.96/77 had arisen and the Division Bench comprising of Hon'ble Mr. Justice M.P. Thakker and Hon'ble Mr. Justice R.C. Mankad by a detailed order found that the relevant record was not taken in consideration by the Tribunal while deciding the appeals. The matter was therefore remitted to the Tribunal for a fresh decision, as noted above.

The Tribunal thereafter in compliance with the directions of this court heard the matter afresh by giving both the sides an opportunity for placing on record the relevant documents and by its detailed order dated 21.12.82 came to a finding on the totality of circumstances and an overall view of the matter that the surplus realized by the assessee from the transaction in question during the two years under appeal was exigible to tax as income from business and not as capital gains.

4. The case of the assessee was that he had migrated from Burma to India in 1965 and at that time he had remitted a sum of Rs.2,53,000/- from Rangoon. Since he was not having any business activity it was decided by him to start some industry and for that purpose he purchased a plot of land on 20.4.67 for a sum of Rs.153681/- from one Ratanji Fardunji & Sons, Bilimoria. Out of these lands he sold two rooms for a sum of Rs.11,998/- alongwith some scrap and the surplus was shown as a short term capital gain. According to the assessee due to ill health he gave up the idea of starting an industry and decided to sell the lands which he had purchased. He thereafter sold the land to Shantiniketan Cooperative Society and realized the surplus of Rs.51684/- which was disclosed by him as capital gains in the assessment year 1970-71. The surplus of Rs.835/which was for the assessment year 1971-72 was not disclosed as capital gain since it was less than Rs.5000/-. According to the assessee the surplus also included the excess realisation on the sale of plot belonging to his wife. According to the assessee since he was not a trader or a dealer and had not borrowed any amount to embark upon an adventure as a dealer in trade and that he had purchased the land in 1967 and sold it after two years because of his inability to start the business, the transaction in question could not be treated as an adventure in the nature of trade.

The case of the department on the other hand is that the admitted and proved facts indicated that frequent transactions were entered into by the assessee during the relevant period which suggested that he had

undertaken a systematic activity of purchase and sale of land which can be treated as a business activity or atleast an adventure in nature of trade. According to the Revenue various transactions in land entered into by the assessee were not isolated instances and it was not as if the assessee had purchased a plot of land by way of capital investment. According to the Revenue, since admittedly the assessee had purchased three parcels of land within a short span of time, it would go to indicate that he had an intention to embark upon an adventure in the nature of trade. Furthermore, the magnitude of purchases and sales supported the conclusion reached by the Commissioner that the transaction in question was an adventure in the nature of trade. The Revenue relied upon the frequency of transactions and the development of plots by incurring expenditure on roads and plotting in support of its case that the assessee had done business from the transaction in question and it was not just an investment.

5. The Learned Counsel appearing for the assessee contended that even on the findings reached by the Tribunal its conclusion was not at all justified. He submitted that the Tribunal had found that the assessee had purchased the plot of land out of remittances which he had made from Burma with a view to start some industry and that due to ill health he gave up the idea and decided to sell the land. It was pointed out that the Tribunal had held that the assessee was not dealing in land and that the initial purchase of land was not with a view to deal in land but the object was not realized. It was contended that in background of this filing the Tribunal could not have reached the conclusion that the transaction in question was an adventure in nature of trade. The Learned Counsel placed heavy reliance on the decision of the Hon'ble Supreme court in G.Venkataswami Naidu & Co. Vs. Commissioner of Income-Tax reported in 35 ITR 594, and the decision of CIT V/s. P.K.No.Co.Ltd reported in 60 ITR 65 in support of his contention that the factors which were treated as relevant in deciding the character of such transactions were not present in this case. It was contended that the totality of all the relevant facts and circumstances which were on the record of the present case indicated that the assessee had purchased the land only with a view to make an investment. It was contended that a mere intention to make profit was not a decisive factor and that just because profit had resulted from the transaction it could not be inferred that the assessee had entered into a transaction of adventure in nature of trade. It was argued that the conclusions reached by the Tribunal as

regards the nature of the transaction were not justified from the evidence on record.

6. The Learned Counsel for the Revenue contended that the admitted and proved facts indicate that the transactions were frequent and in the nature of adventure in trade. It was pointed out that admittedly a large parcel of land was purchased on 20.4.67 and before the sale of that land other purchases were also made on 26.3.68, 26.2.69 and 29.3.71. It was also pointed out that the assessee had incurred expenses on laying roads, had sold two rooms and two plots, and effected sale in favour of the society after developing the land by laying out roads. It was also pointed out that in the year ending 31.3.1971 the assessee had admittedly treated the land as stock in trade in his books. It was submitted that the burden of proof which lies initially on the Revenue stood discharged from the facts and circumstances which were admitted and proved. The Learned Counsel for the Revenue also referred to the above decisions of the Supreme court in support of his contention that no single factor was decisive, and submitted that the totality of the facts established, would show in the present case that the transaction in question was an adventure in the nature of trade. He also referred to the decision of Supreme Court in A.M.Mohammed V/s. CIT reported in 73 ITR 735. in support of the contention that no single test or formula could be applied in determining whether a transaction was an adventure in the nature of trade or not and the answer necessarily depends on the total impression and effect of all the relevant facts and circumstances proved in the case which determine the character of the transaction. He placed strong reliance on the decision of this court in Hemachand H Shah V/s. CIT reported in 206 ITR 55 in support of his argument that since the assessee had entered into a series of transactions of purchases and sale within a short time, the Tribunal was right in holding that he was carrying on an adventure in the nature of trade when he purchased and sold the land. He also relied on the decision of this Court in D.S.Virani V/s. CIT reported in 90 ITR 255 in support of his contention that since the assessee had developed the land by laying out roads, sold some plots to two persons, and also two rooms, and the remaining land to the society and had also entered into other transactions of purchase of land and sale he had entered into the transaction in question by way of trading activity.

7. The factors which must be kept in mind while examining the question whether a particular transaction

is an adventure in the nature of trade as emanating from the aforesaid decisions of the Supreme Court were also culled out in D.S.Virani's case (Supra) are now well settled. Initially the burden lies on the revenue to establish that the profit earned in a transaction is within the taxing provision and the burden can be discharged by pointing out the circumstances which show that the transaction is an adventure in the nature of trade. It is recognised that there is no universal test which would be applicable in all case for determining whether the transaction is an adventure in the nature of trade. It is also recognised that no single fact or circumstances has a decisive significance and it is the totality of the relevant facts and circumstances that has to be taken into account for the purpose of determining the nature of the transaction. As held by the Hon'ble the Supreme Court in CIT V/s. P.K.Co. & Ltd. (Supra), determination of the question that in purchasing and selling land the taxpayer enters upon a business activity has to be determined in the light of the facts and circumstances. In Venkataswami Naidu's case the Supreme Court observed that even an isolated transaction can satisfy the description of an adventure in the nature of trade, provided, at least some of the essential features of trade are present in the isolated or single transaction. In deciding the character of such transactions several factors are relevant such as, whether the purchaser was a trader and the purchase of the commodity and its resale were allied to his usual trade or business or incidental to it; the nature and quantity of the commodity purchased and resold; any act subsequent to the purchase to improve the quality of the commodity purchased and thereby make it more readily resaleable; any act prior to the purchase showing a design or purpose; the incidents associated with the purchase and resale; the similarity of the transaction to operations usually associated with trade or business; the repetition of the transaction; the element of pride of possession etc. It was held that the presence of all the relevant factors can help the court to draw an inference that the transaction is the nature of trade but it is not a matter of merely counting the number of facts and circumstances pro and con; what is important to consider is their distinctive character and in each case it is the total effect of all relevant factors and circumstances that determines the character of the transaction. It was also held that in cases where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it, the presence of such an intention is a relevant factor

and unless it is offset by the presence of other factors it would raise a strong presumption (but rebuttable) that the transaction is an adventure in the nature of trade. As remarked by Lord Sands in IR V.Livingston II T.C., 538 at 545 it is ultimately "a matter of impression with the court whether a particular transaction is in the nature of trade or not". Lord Clive LP observed in Balgowwie Land Trust Ltd. Vs. IR 14 TC 684 at 691 (quoted with approval in Venkataswami case (Supra)) "Transactions of sale are characteristic of trade, but they are not necessarily distinctive of it, much depends on the circumstances."

7. Keeping in view the ratio of the above decisions we proceed to examine whether the Tribunal has committed any error in deciding that the transaction in question was adventure in nature of trade. To judge the nature of the transaction we fall back on the facts which are proved or admitted and have not been disputed during the course of hearing. These are :-

Purchases made by the assessee :

- i. The assessee purchased on 20.4.67 a large area of 64698 sq.ft of land at the cost of Rs.153608/from Ratanji Fardunji & Sons at Bilimora.
- ii. The assessee on the same date i.e. 20.4.67 also purchased land from Ratanji Fardunji & Sons in the name of his wife for a sum of Rs.31589/-.
- iii. The assessee again purchased land on 26.3.98 from Smt.Jiniben Jalbhai at the cost of Rs.43350/-.
- iv. He further purchased land on 26.2.69 from Smt.Jiniben Jalbhai at the cost of Rs.66333/-.
- v. Thereafter, on 29.3.71 he again purchased land from Jiniben Jalbhai at the cost of Rs.31571/-.

Sales effected by the assessee :

- vi. The assessee sold two rooms of the chawl on 25.3.69 which covered upto 1047.01 sq.ft and made a profit of Rs.33,398/-.
- vii. On 28.3.69 he sold two plots of land admeasuring 11153 sq.ft making profit of Rs.23,306/-.
- viii. On 31.3.70 he sold 1047.01 sq.ft. of land making profit of Rs.2,46,047/-.

ix. From 30.9.69 to 6.11.70 he sold 23126 sq.ft of land and made a profit of Rs.40,846/-.

x. He sold a room on 31.3.70 making a profit of Rs.5999/-.

The above transactions were taken to be admitted transactions during the course of hearing and both the sides referred to the tables indicating these transactions which were contained in the record. It is further proved that the assessee in the year 1968-69 had incurred expenses on laying out roads.

8. All the above factors were taken into account by the Tribunal while keeping in view the fact or its finding that the assessee who had initially wanted to start an industry and had made purchase of lands on 20.4.67 could not carry out that intention due to ill health as stated by him and that he was not a dealer in land. On the basis of the totality of the facts and circumstances proved or admitted the Tribunal took a view that the subsequent purchases of land which were effected after the disposal of plots by the assessee out of the land which was originally purchased, would stamp transaction as a trading activity. It was found that the assessee had purchased the 'chawl' and two rooms were sold out within a short period and the surplus was claimed for the assessment year 1969-70 as a short term capital gain.

9. The assessee did not confine his activity merely to the disposal of the plot which he had initially purchased but had in between made fresh purchases of other lands. If the assessee who had purchased the plot on 20.4.67 had done it only with an intention of setting up an industry and by way of investment, there was absolutely no reason for him to make further purchases of land on 26.3.68 and 26.2.69 during the previous year relevant to the same assessment year 1969-70. The assessee had purchased a vast area of land in his own name on 20.4.1967 admeasuring 64698 sq.ft. for a large sum of Rs.153608/- and on the same day another area costing Rs.31581/- in the name of his wife. The quantum of investment and the nature of transaction coupled with the fact that he made further purchases of land belonging to Smt.Jiniben Jalbhai which cost him Rs.109648/- in all, being the total of the two transaction of purchase made by him on 26.3.68 and 26.2.1969, clearly show that the assessee's intention was not just to make an investment. If the sales made by the assessee on 25.3.69 and 28.3.69



out of the lands which were purchased by him in his name and the name of his wife on 20.4.67 were effected only with a view to get rid of the locked up investment, since according to the assessee he could not start the industry, there was absolutely no need for the assessee to make two more purchases in between, on 26.3.68 and 25.2.69, of the lands from Smt.Jiniben. These circumstances had weighed with the Commissioner and equally with the Tribunal and in our opinion rightly so. The frequency of the transactions is clearly established and the course of conduct of the assessee during the two assessment years in question, clearly is indicative of the fact that the transactions in question were adventure in the nature of trade and were not just investments. We are of the opinion that there was sufficient material on the record of the case for the Tribunal to reach the conclusion that it did as regards the nature of this transaction and that the Tribunal has not committed any error in arriving at the conclusion that the transaction of sale of land by the assessee was an adventure in the nature of trade.

10. The question referred to us is therefore answer in the affirmative against the assessee and in favour of the Revenue. The reference stands disposed of accordingly with no orders as to costs.

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